IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 08/10/2004

CORAM

THE HONOURABLE MR. JUSTICE P.K. MISRA
AND
THE HONOURABLE MR. JUSTICE K.P. SIVASUBRAMANIAM

H.C.P.NO.521 OF 2004

R. Rajkumar
S/o. Ramasamy .. Petitioner

-Vs-

1. The State of Tamil Nadu
Rep. by the Secretary to the Govt.,
Public (SC) Department,
Fort St. George,
Madras 600 009.

2. The Union of India,
Rep. by the Secretary to Govt.,
Ministry of Finance,
Department of Revenue,
(COFEPOSA Unit),
Central Economic Intelligence Bureau,
Janpath Bhavan, Janpath,
New Delhi 110 001.

3. The Superintendent of Central Prison,
Central Prison, Trichy 3. .. Respondents

Petition filed under Article 226 of the Constitution of India for the issuance of Writ of Habeas Corpus as stated therein.

For Petitioner : Mr.M.M.K. Alifudeen

for Mr.C.T. Subbiah

For Respondents 1-3 : Mr. Abudukumar Rajarathinam
Govt. Advocate (Crl.Side)

For Respondent-2 : Mrs. Vanathi Srinivasan
ACGSC

:J U D G M E N T

P.K. MISRA, J

This Habeas Corpus Petition has been filed by the detenu himself challenging the order of preventive detention dated 23.12.2003 passed under Section 3(1)(i) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (Central Act 52 of 1974), hereinafter referred to as COFEPOSA.

2. Petitioner is a Srilankan national. The order of detention was served on 24.12.2003 along with the grounds of detention. In the grounds, it is indicated that the detenu was intercepted by the custom officials belonging to the Department of Revenue Intelligence. When questioned about possession of any foreign currency and declaration thereof, the detenu answered in negative. On a search of the detenu person, it was found that he was carrying 5250 Srilankan Rupees and 23 US Dollars in his pocket. Thereafter, the officers of Department of Revenue Intelligence checked the baggage of the detenu and it was found that foreign currencies (46,350 US Dollars) had been kept concealed in a cavity between two layers of the carton, wherein Godrej hair dye had been packed. The detenu gave a statement that the carton containing Godrej hair dye had been handed over by one Vijayakumar of Mannadi at Chennai with an instruction to handover to one Udayan of Srilanka and the detenu would be paid at the rate of Rs.250/- (in Srilankan currency) per kg. by the aforesaid Udayan at the time of delivery of the goods. It was further stated by the petitioner that he did not know about the concealment of Dollars in such carton and had he known, he would not have committed the offence. The detenu after being arrested on 13.12.2003, on the basis of the aforesaid incident, was produced before the Judicial Magistrate-1, Trichy and was remanded. Subsequently, the preventive order of detention dated 23.12.2003 was passed.

3. On the basis of the aforesaid factual background, the learned counsel for the petitioner has contended that in view of the specific stand of the petitioner in his statement before the custom officials at the time when he was apprehended, there was no basis for passing an order of preventive

detention, as there is nothing on record to indicate that the petitioner had knowledge about the concealment of the foreign currency in the carton containing Godrej hair dye and, since the petitioner was innocent, no order of preventive detention should have been passed, and there was no basis for passing such an order. The petitioner has further submitted in this connection that the custom officials should have verified about the explanation given by the petitioner, by questioning Vijayakumar, who had handed over the carton containing Godrej hair dye.

4. The aforesaid contention raised on behalf of the petitioner is resisted by the learned Government Advocate appearing for the respondents 1 and 3. It is submitted by the learned counsel for the State that as apparent from the grounds of detention, the petitioner had visited India very frequently in the past and on the basis of the passport dated 28.8.2003, he had visited at least nine times within a short span of hardly three months, and on the basis of such previous conduct and on the basis of the statement made by the petitioner before the custom officials, the detaining authority came to the subjective satisfaction that the petitioner was required to be kept under preventive detention and there is no reason to interfere with the discretionary order passed by the detaining authority on the basis of subjective satisfaction by taking into account the relevant factors. It is also pointed out by the learned counsel that as a matter of fact, the petitioner had merely given the name of Vijayakumar of Mannadi without giving any details about the actual address and even without giving any contact phone number, which itself is a suspicious circumstance to discount the plea of innocence of the petitioner.

5. It is of course true that the detaining authority has relied upon the confessional statement made by the petitioner himself and in such statement, the petitioner had given explanation that the carton had been handed over by one Vijayakumar of Mannadi at Chennai and the petitioner was not aware of the concealment of the foreign currency. There is no dispute that the carton containing concealed foreign currency was being carried by the petitioner as a registered baggage. The detaining authority had considered the statement of the petitioner and in the background of the facts, as revealed, had come to a subjective satisfaction. At that stage, the detaining authority was not required to come to a definite conclusion of the culpability of the person concerned on the basis of any detailed enquiry in the matter nor was required to weigh the pros and cons in an objective manner. Even though there may be possibility of some truth in the explanation furnished by the detenu, which may be accepted in a Court of law in a regular trial of the criminal case, the subjective conclusion of the detaining authority cannot be characterised as unfounded or fully without basis so as to warrant interference in a proceedings under Article 226 of the Constitution of India. If the subjective satisfaction of the detaining authority is one which could have been arrived at on the basis of the materials on record, the High Court is not empowered to interfere with such order merely on the footing that possibly a different view can be taken in the matter in a regular trial. Since the High Court does not sit as an appellate authority in such matters,

keeping in view the limited scope of interference in such matters, we do not think that the conclusion of the detaining authority can be said to be without any basis, requiring any interference by the High Court.

6. Learned counsel for the petitioner has relied upon the decision of the Supreme Court in 2002(2) CTC 178 (CHOWDARAPU RAGHUNANDAN v. STATE OF TAMIL NADU AND OTHERS) and has contended that in view of the clear statement made by the detenu himself, the detaining authority should have applied his mind carefully to the various facts and circumstances, particularly, regarding the explanation to the effect that the carton had been handed over by one Vijayakumar of Mannady.

7. We have carefully perused the aforesaid decision of the Supreme Court, particularly the observations made by Raju, J in the concurring opinion, on which strong reliance has been placed by the learned counsel for the petitioner. While considering the relevant circumstances, it was observed :-

6. ... So far as the facts on record in this case are concerned, it is seen that a stand has been taken for the petitioner, at any rate, from the time of filing the bail application on 18.4.2001, that the baggage in question did not belong to him, that the earlier statement obtained was under threat, coercion and undue influence and that those baggage did not contain any tag also to connect the same with him. That apart the specific stand taken for the petitioner is also that the baggage containing the goods in question were in name of one Babu with his ticket number and address and no action could be taken against him before recording a finding properly and deciding on the basis of any concrete material the ownership of the disputed baggage. All the more so when the Department itself has been after the said person also and the matter has not reached to any final conclusion. As for the grievance that these relevant materials have not been adverted to or considered by the Detaining Authority before ordering the detention of the petitioner, in the counter affidavit filed on behalf of the 1st respondent Detaining Authority, it is admitted that investigation is still pending to ascertain the involvement and role of the other person but that may not have any significance or relevance in the teeth of the admission contained in the confessional statement of the petitioner and that at any rate the Detaining Authority was very much aware of those facts when the order of detention came to be passed.

8. We do not think that the facts and circumstances of the present case are of any perceptible resemblance to the facts and circumstances of the case decided by the Supreme Court. In the said case, there was a basic dispute regarding the fact as to whether the baggage was under the possession of the detenu. In the present case, it is not at all disputed that the baggage in question was being transported by the detenu, but he has come out with a specific plea that he had no knowledge regarding the concealment of the foreign currency in such baggage. If the specific address and/or the contact telephone number of Vijayakumar would have been indicated by the petitioner in

his statement made before the custom officials, may be one could have found fault with the custom officials for not directing their investigation further on the said aspect. In the present case, in the grounds of detention, the detaining authority has indicated the fact that the petitioner even if claims that he had earlier been engaged in the same manner by the very same Vijayakumar, yet he has not furnished any concrete address of Vijayakumar. Even in a Court of law, in a regular trial, the petitioner would be required to discharge the onus in view of the specific provision contained in Section 135A of the Customs Act regarding the fact as to whether he had knowledge or otherwise regarding the foreign currency.

9. In the aforesaid decision of the Supreme Court, the person in question had visited the foreign country merely on two occasions, whereas, in the present case, the petitioner had visited India on nine occasions within a very short span of a few months. The possibility of the petitioner accepting goods for transportation on payment of some commission is indeed

very remote, unless there is sufficient contact between the two. The least one could have e xpected is furnishing of address of such person, from whom the petitioner claims to have received the goods.

10. In view of the peculiar facts and circumstances of the present case, we do not think that the ratio of the decision of the Supreme Court in 2002(2) CTC 178 (cited above) can be made applicable.

11. Learned counsel for the petitioner has then contended that admittedly the passport of the petitioner has been impounded and in the absence of a passport, there is no possibility at all of the petitioner, even if released on bail, committing any similar offence in future. For the aforesaid purpose, he has placed reliance upon the decision of the Supreme Court reported in 2002 (83) ECC 281 (SC) (RAJESH GULATI v. GOVT. OF NCT OF DELHI & ANOTHER). In the aforesaid case, the Supreme Court had observed :-

 15. In other words according to the detaining authority the prime mover for the smuggling activity was the proprietor of M/s.B.D. Denim. The appellant at the worst was a pawn in the hands of another. The likelihood of the appellant indulging in smuggling activities by the appellant was in any case effectively foreclosed by the retention of his passport by the customs department. The detaining authority noted that the appellant's passport was with the customs department and yet he said "but you are likely to travel clandestinely for the purpose of smuggling". Now none of the instances of smuggling by the appellant as stated in the impugned detention order describe the appellant as having travelled without a passport for the purpose of smuggling. The conclusion that despite the absence of his passport the appellant could or would be able to continue his activities is based on no material but was a piece of pure speculation on the part of the detaining authority. These findings are sufficient to invalidate the impugned detention order...

12. As apparent from a perusal of the aforesaid paragraph in the said case, the detaining authority had concluded that the detenu was likely to travel clandestinely for the purpose of smuggling and in that context, the Supreme Court observed that in none of the instances of smuggling of the detenu it had been stated in the impugned order that the detenu had travelled without a passport for the purpose of smuggling, and therefore, the Supreme Court observed The conclusion that despite the absence of his passport the appellant could or would be able to continue his activities is based on no material but was a piece of pure speculation on the part of the detaining authority. Moreover, there is nothing to indicate that the detenu in the present case is merely a pawn in the hands of another. We do not think that in the facts and circumstances of the present case, the aforesaid decision would be applicable.

13. On the other hand, as rightly contended by the learned counsel for the State, the subsequent decision of the Supreme Court in 2003 SCC (Cri) 1463 (SITTHI ZURAINA BEGUM v. UNION OF INDIA AND OTHERS) is squarely applicable. In the aforesaid case, the earlier decision of the Supreme Court was distinguished and it would be apt to quote from the judgment itself :

8. Lastly, it is urged on behalf of the detenu that a solitary instance without any propensity to evade duty should not be made a ground for detention and particularly when his passport had been seized on the same day of his arrest, there is no chance of his committing further acts of smuggling for which he has now been detained. In this context, the learned counsel placed reliance on the decision in Rajesh Gulati V. Govt. of NCT of Delhi to contend that retention or cancellation of passport will cripple the smuggling activity inasmuch as there is no material to show that even in the absence of a passport he would be able to continue the activities in respect of which he is detained; that such an attempt would be merely speculative based on no material.

9. The stand of the Department is that whether there can be detention on a solitary instance would depend on the facts and circumstances of each case, on the magnitude of the case and other attendant circumstances. In the present case, it is stated that the detenus passport disclosed that he had made several trips abroad and he was not a man of such affluence as to make so many trips out of the country unless they be in the context of his business activities. Therefore, considering the number of trips he had made out of the country, the volume of goods seized now and the prima facie misdeclaration of value, an inference can be drawn that the detenu was part of a bigger network in bringing the goods for commercial distribution inside the country by avoiding the payment of duty. In this background, absence of passport will not be a handicap to the detenu for his activities in the present case in which the fact situation is different from the one available in Rajesh Gulati case. Nor can we confine the meaning of the word smuggling only to going out of the country and coming back with goods which are contraband or to evade duty but may encourage such activities as well by dealing in such goods.

14. In our opinion, the latter decision of the Supreme Court

is more applicable to the facts and circumstances of the present case.

15. The last and somewhat inevitable contention raised by the learned counsel for the petitioner is the alleged delay in consideration of the representation of the petitioner. It is contended that a written representation dated 31.3.2004 had been prepared by the counsel for the detenu and the same had been sent to the Superintendent of Central Prison, Tiruchy, along with the counsel□s covering letter dated 3 1.3.2004, requesting the jail authorities to send the representation to the appropriate authorities, but those representations were not under active and continuous consideration of the authorities and there had been delay in consideration.

16. In the counter affidavit filed on behalf of the second respondent, it has been indicated that the representation was forwarded by the Superintendent, Central Prison, Tiruchy by letter dated 6.4.2004, which was received in the COFEPOSA Unit of Ministry of Finance, Department of Revenue, New Delhi on 12.4.2004 and parawise comments were called for from the sponsoring authority, namely the Additional Director General, DRI, Chennai on 12.4.2004. In the meantime, comments of the sponsoring authority on the representation was received in the COFEPOSA Unit of Ministry of Finance on the evening of 13.4.2004. 14th April, 2004 was a holiday and the documents were placed before the Under Secretary on 15.4.2004, who processed the case and put up the file to the Joint Secretary on the very same day, who in turn submitted the file to the Special Secretary and Director General. Ultimately, the representation was considered carefully and rejected on 15.4.2004 itself and the detenu was communicated vide Memorandum dated 15.4.200 4.

17. The stand taken by the second respondent is also clearly indicated in paragraph 11 of the counter affidavit filed by the first respondent. In view of the above, it cannot be said that there has been any undue delay in consideration of the representation of the petitioner.

18. For the aforesaid reasons, we do not find any merit in this habeas corpus petition, which is according rejected.

Index : Yes
Internet: Yes
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To

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Public (SC) Department,
Fort St. George,
Madras 600 009.

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Rep. by the Secretary to Govt.,
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(COFEPOSA Unit),
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3. The Superintendent of Central Prison,
Central Prison, Trichy 3.

4. The Public Prosecutor,
High Court, Madras.